STATE OF MICHIGAN

COURT OF APPEALS

LYNN KNAUF,

Plaintiff-Appellant,

v

KJB ENTERPRISES, INC., d/b/a SPARTA PUB,

Defendant-Appellee.

UNPUBLISHED
December 5, 2006

No. 269449
Kent Circuit Court
LC No. 05-004463-NO

Before: O'Connell, P.J., and White and Markey, JJ.

PER CURIAM.

In this premises liability and nuisance action, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(10). We affirm.

On February 22, 2005, plaintiff Lynn Knauf fell and broke his leg when he slipped on a patch of ice outside of defendant's establishment, the Sparta Pub. According to plaintiff and the police officer who responded to the scene, the ice formed because an overhanging downspout discharged water onto the walkway that ran in front of the kitchen's delivery door. When plaintiff headed to his car to go home, he went through the back exit, turned right, and walked along the asphalt near the building. The evidence demonstrated that the asphalt parking surface ran right to the building's foundation. Plaintiff slipped as he passed the kitchen door near the corner of the building. He sued, alleging that defendant negligently failed to remove the ice or warn plaintiff of the hazards presented by the ice and further alleging that the downspout was a private nuisance. The trial court granted summary disposition in favor of defendant on the basis that the icy condition was open and obvious and that plaintiff failed to establish the existence of a nuisance on defendant's premises.

Plaintiff first argues that the trial court erred because the open and obvious doctrine does not apply to this case. We disagree. "Generally, a premises possessor owes a duty of care to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328; 683 NW2d 573 (2004). However, the duty does not "encompass a duty to protect an invitee from 'open and obvious' dangers," unless "there are 'special aspects' that render even an 'open and obvious' condition 'unreasonably dangerous . . . .'" *Id*. The risk of slipping on exposed snow and ice is open and obvious, *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002), and an avoidable condition that could cause someone to fall in a parking lot lacks "special aspects" that would make the condition "unreasonably dangerous."

Lugo v Ameritech Corp, Inc, 464 Mich 512, 520; 629 NW2d 384 (2001). The open and obvious doctrine applies equally to conditions that are known to invitees. *Id*. at 516.

The particular hazards presented by the ice in this case were open and obvious. The evidence suggested that plaintiff, a lifelong Michigan resident, was heading home form the pub because the weather had admittedly turned "ugly." He admitted that the ice was not hidden from view, and others who arrived later testified that they could see the large patch of ice on which plaintiff slipped. Only two witnesses did not claim to see any ice, the owner of the bar and plaintiff. However, the owner had passed by the area more than an hour before and merely testified that he did not notice any ice. Plaintiff claimed that he did not remember much of anything about the event, because it "happened so fast," and he did not know if he was watching where he was walking. The evidence established that the patch of ice, if properly observed, was avoidable.

Plaintiff was a regular patron of the pub and was familiar with the walkway behind it. He had even happened into the pub around lunchtime on the day he fell. He testified that he knew that the downspout poured water directly onto the pavement near the kitchen door. Approximately one hour before plaintiff left the bar, the owner of the bar told him that "it was getting nasty out." The paramedics who arrived to attend to plaintiff testified that it had been raining, snowing, and sleeting all night. One of them testified that the roadways and the pub's parking lot were "really slippery." Under the circumstances, plaintiff was aware of the conditions that led to the ice patch and was further "able to discover the danger and the risk presented upon casual inspection . . . ." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Under the circumstances, the danger was open and obvious, and there was no genuine issue of material fact regarding whether the circumstances created an unreasonably dangerous condition.

Plaintiff next contends that the application of the open and obvious doctrine violated his constitutional right to a jury trial. We disagree. When a case boils down to a legal question formed by uncontested facts, a court may decide the question and grant summary disposition without violating the right to a jury trial. *Moll v Abbott Laboratories*, 444 Mich 1, 27-28; 506 NW2d 816 (1993). Whether a defendant owes a legal duty to a plaintiff is a question of law for the court. *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

Plaintiff next contends that the trial court erred in granting summary disposition in favor of defendant because the condition on defendant's premises was a public nuisance. We disagree. "A public nuisance is an unreasonable interference with a common right enjoyed by the general public." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). Generally, the interfering conduct must "significantly" affect "the public's health, safety, peace, comfort, or convenience . . . or . . . be of a continuing nature that produces a permanent or long-lasting, significant effect . . . ." *Id*.

In this case, the icy condition did not significantly interfere with any right of the general public. The isolated patch of ice was completely avoidable by the general public, even those who wanted to enter the pub through its back entrance. It was certainly not in a location normally traversed by the public at large, so it did not significantly affect the health, safety, or convenience of the general public. Plaintiff also failed to demonstrate that the condition was permanent or long lasting, even during the winter months. Plaintiff admits that the condition did

not exist "during the eight or so months out of the year when temperatures stay above freezing. Nor would it be a problem when temperatures are cold but conditions are dry." Plaintiff's argument also fails to account for other factors, such as periodic deicing of the area by employees. Under the circumstances, plaintiff failed to present evidence that the ice patch was "permanent" or severely detrimental to the public's well being, so the trial court properly granted summary disposition in favor of defendant on plaintiff's public nuisance claim. *Id*. Because defendant was entitled to summary disposition on plaintiff's public nuisance claim, we do not address the issues whether the open and obvious doctrine is a defense to a public nuisance claim and whether the application of the open and obvious doctrine to a nuisance claim would violate plaintiff's constitutional right to a jury trial.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jane E. Markey